



Planning Department

TOWN OF ACTON
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MEMORANDUM

To: Planning Board **Date:** January 16, 2007
From: Roland Bartl, AICP, Town Planner
Subject: Chapter 79 of the Acts of 2006 (Mullin Rule) *RB*

New Chapter 79 of 2006 provides for Board members to miss one hearing session without losing eligibility to vote on a matter provided such member(s) certify in writing that they have examined all evidence from the missed session including a video or audio record of the proceedings. The video/audio record of the proceedings would become a permanent record of the hearing, which we would have to maintain for the statutory number of years.

The law is a local option, meaning that it requires adoption at Town Meeting to be effective in Acton, and Town Meeting may further specify to which Boards in Acton the law shall apply. Compliance with quorum requirements can be a challenge especially during extended hearings with multiple hearing sessions. Chapter 79 is intended to provide some relief. However, there is a consequence, which Town Counsel describes as: "... that anything that is said on such an audio or video recording or a transcript (*thereof*) is discoverable in any future litigation. This will likely lead to more "formal" hearings by boards in the future if the Act is adopted and such records are routinely prepared and maintained of public hearings".

There is good chance that there will be an article at Town Meeting for adoption of Chapter 79. The Planning Board may wish to advise the Board of Selectmen if it wants to take part or not.

Roland Bartl

From: Stephen Anderson
Sent: Tuesday, January 16, 2007 1:22 PM
To: Roland Bartl
Cc: Manager Department
Subject: RE: Acton/GenSel: Chapter 79 of the Acts of 2006

Yes, if the Town adopts Chapter 79 of the Acts of 2006 and if a Board member "attends" the meeting by viewing the video or listening to the audio, in my view, those records become part of the public record of the hearing, constitute public records, and must be maintained in accordance with the public records laws even after the member has certified his/her review. See 950 CMR 32.03 (defining "Public Records" to include all recorded tapes or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any political subdivision unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7(26)).

Steve

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Tuesday, January 16, 2007 11:47 AM
To: Stephen D. Anderson
Cc: Manager Department
Subject: RE: Acton/GenSel: Chapter 79 of the Acts of 2006

Steve:

Would the video/audio records have to be maintained after the member has certified his/her review? Or can the video/audio record be destroyed after they served their statutory purpose? My sense of the Planning Board is that they would prefer the latter. Do you have a read on this question?

Thanks -

*Roland Bartl, AICP
Town Planner, Town of Acton
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978-264-9636*

-----Original Message-----

From: Stephen Anderson
Sent: Tuesday, January 09, 2007 9:06 PM
To: Roland Bartl; Don Johnson; John Murray
Subject: FW: Acton/GenSel: Chapter 79 of the Acts of 2006

As discussed today.

Steve

From: Stephen D. Anderson
Sent: Friday, May 19, 2006 8:00 PM

1/16/2007

To: djohnson@town.acton.ma.us; jmurray@acton-ma.gov

Cc: 'rbartl@acton-ma.gov'; Tom Tidman; 'Doug Halley'; Garry Rhodes; Arthur Kreiger; Clark Cornwell; Daniel C. Hill; Douglas Wilkins; Edwin Betancourt; Elizabeth M. Pyle; George Hall; Jeffrey Roelofs; Kevin D. Batt; Mary Liz Brenninkmeyer; Maurya Sullivan; Scott F. Lacy; Stephen D. Anderson; William L. Lahey

Subject: Acton/GenSel: Chapter 79 of the Acts of 2006

<<sl060079.htm>> <<Accept-c79-2006-General.doc>> <<Accept-c79-2006-Specific.doc>>

Gentlemen:

On May 12, 2006, Governor Romney signed into law the latest version of the bill that will, upon municipal acceptance, allow a member of any municipal board, committee or commission when holding an adjudicatory hearing to vote in the matter even if the member missed a single session of the hearing at which testimony or other evidence is received. The absent member must, before any such vote, certify in writing that s/he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing.

The law was passed without an emergency preamble; therefore it takes effect 90 days later (on August 10, 2006).

Municipal acceptance can take one of two forms, and I have attached a draft of a Warrant Article, Summary and Motion for both forms of acceptance:

1. The first form of acceptance is general. If the Town passes this article, the statute will then apply to all types of adjudicatory hearings conducted by any municipal board, committee or commission of the Town.
2. The second form of acceptance is specific. If the Town passes this article, the statute will then apply only to those types of adjudicatory hearings conducted by those types of municipal boards, committees or commissions specifically listed. The list I have included can be added to or reduced in scope as the Town sees fit.

There are several ambiguities readily apparent from a reading of Chapter 79 of the Acts of 2006. For example:

1. The Act refers to a **member** of any municipal board, committee or commission. This leads to the question whether an associate member or an alternate member can miss a session of the hearing and still vote after providing the required certification.
2. The Act is silent as to whether it applies to hearings begun before the effective date of the Act (8/10/06), which are still open on that date. In other words, can a member vote on a matter where s/he had a pre-8/10 absence by providing a post-8/10 certification?

To a limited extent, the Town may be able to anticipate and resolve these issues by adopting "minimum additional requirements for attendance at scheduled board, committee, and commission hearings under this section," as allowed by paragraph (b) of Chapter 79. Otherwise, these and other issues will likely be resolved by court challenges in the future.

To vote, a missing member must certify that s/he has reviewed "an audio or video recording of the missed session or a transcript thereof." Accordingly, if the Town adopts the statute for any or all boards, the Town should establish a procedure by which audio or video recordings are maintained or a transcript is prepared of multi-session hearings. This may involve an arrangement with the Town's cable provider (for boards whose hearings are televised) or an alternate arrangement for other boards.

Finally, Town boards will recognize that anything that is said on such an audio or video recording or a transcript is discoverable in any future litigation. This will likely lead to more "formal" hearings by boards in the future if the Act is adopted and such records are routinely prepared and maintained of public hearings.

If you have any questions, please let me know.

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Chapter 79 of the Acts of 2006

AN ACT FURTHER REGULATING MEETINGS OF MUNICIPAL BOARDS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

Chapter 39 of the General Laws is hereby amended by inserting after section 23C the following section:-

Section 23D. (a) Notwithstanding any general or special law to the contrary, upon municipal acceptance of this section for 1 or more types of adjudicatory hearings, a member of any municipal board, committee or commission when holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to that member's absence from no more than a single session of the hearing at which testimony or other evidence is received. Before any such vote, the member shall certify in writing that he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing. Nothing in this section shall change, replace, negate or otherwise supersede applicable quorum requirements.

(b) By ordinance or by-law, a city or town may adopt minimum additional requirements for attendance at scheduled board, committee, and commission hearings under this section.

Approved May 12, 2006.

Return to:

[List of Laws passed in 2006 Session](#)

[General Court home page](#), or

[Commonwealth of Massachusetts home page](#).

ARTICLE __ ACCEPT CHAPTER 79 OF THE ACTS OF 2006
(Majority vote)

To see if the Town will vote to accept Chapter 79 of the Acts of 2006 for all types of adjudicatory hearings conducted by any municipal board, committee or commission of the Town, or take any other action relative thereto.

SUMMARY

This article provides for the acceptance of Chapter 79 of the Acts of 2006, relative to regulating meetings of municipal boards. It provides that, upon acceptance, a member of any municipal board, committee or commission when holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to that member's absence from no more than a single session of the hearing at which testimony or other evidence is received. Before any such vote, the member shall certify in writing that he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing.

MOTION

Move that the Town accept Chapter 79 of the Acts of 2006 for all types of adjudicatory hearings conducted by any municipal board, committee or commission of the Town.

ARTICLE ____ Accept Chapter 79 of the Acts of 2006
(Majority vote)

To see if the Town will accept Chapter 79 of the Acts of 2006 for the following types of adjudicatory hearings:

1. Adjudicatory hearings of the Board of Selectmen under any general law, special law, or local bylaw over which the Board of Selectmen has jurisdiction;
2. Adjudicatory hearings of the Board of Selectmen, the Board of Appeals, or the Planning Board under G.L. c. 40A (the "Zoning Act");
3. Adjudicatory hearings of the Board of Appeals under G.L. c. 40B, §§ 20-23 relative to comprehensive permits for low and moderate income housing);
4. Adjudicatory hearings of the Planning Board under G.L. c. 41 (the "Subdivision Control Law");
5. Adjudicatory hearings of the Board of Health any general law, special law, or local bylaw over which the Board of Health has jurisdiction;
6. Adjudicatory hearings of the Conservation Commission the state Wetlands Protection Act and/or the Acton Wetland Protection Bylaw;

or take any other action relative thereto.

SUMMARY

This article provides for the acceptance of Chapter 79 of the Acts of 2006, relative to regulating meetings of municipal boards. It provides that, upon municipal acceptance for one or more types of adjudicatory hearings, a member of any municipal board, committee or commission when holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to that member's absence from no more than a single session of the hearing at which testimony or other evidence is received. Before any such vote, the member shall certify in writing that he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing. This Article specifies the types of municipal adjudicatory hearings for which this acceptance will apply.

MOTION

Move that the Town accept Chapter 79 of the Acts of 2006 for the types of adjudicatory hearings specified in the Article when conducted by the municipal boards, committees or commissions of the Town specified in the Article.